UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 22623 - A

JOHN C. WAGNER, ROBERT L. WAGNER, PETER C. UNGER, Appellants	Appeal from the United States District Court of Oregon, Portland, Oregon
vs.	
UNITED STATES OF AMERICA, Appellee	Honorable ROBERT C. BELLONI Judge Presiding

BRIEF FOR APPELLANT PETER C. UNGER

JOSEPH E. O'CONNOR
Attorney for Appellant

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 22680 - A

JOHN C. WAGNER, ROBERT L. WAGNER, PETER C. UNGER, Appellants, vs UNITED STATES OF AMERICA, Appellee.	Appeal from the United States District Court of Oregon, Portland, Oregon Honorable ROBERT C. BELLONI Judge Presiding

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Attorney for appellant

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II. INDICTMENT

In a 17 Count indictment, 8 individuals and 3 corporations were charged with the substantive offenses of fraud in the sale of securities, mail fraud, false statements, interstate transportation of converted property and conspiracy to commit these offenses.

All defendants were charged with conspiracy to commit fraud in the sale of securities and mail fraud under Count I. John Wagner, Coleman Christensen, and Gordon Jongeward were charged with 5 counts of fraud in the sale of securities, Counts II through VI. The same three defendants were charged with 7 counts of mail fraud, Counts VII through XIII. J. Wagner, Christensen, Jongeward, R. Wagner, and Kosieres were charged with conspiracy to commit fraud against the United States, making false statements to agencies of the United States and interstate transportation of stolen funds under Count XIV. Christensen and J. Wagner were charged with making false statements in a matter within the jurisdiction of the Federal Housing Administration under Count XV and two counts of interstate transportation of stolen property under Counts XVI and XVII.

Counts IV, VII and XII were dismissed by the government.

III. PRELIMINARY STATEMENT

In a 76 page indictment, including 17 separate counts, the defendant, Peter Unger, was charged with only the first count, conspiracy, under subchapter 18 U.S.C. 371 to violate Section 77 Q (a) Title 15, U.S.C. in the offer and sale of securities and also violation of Section 1341, Title 18 U.S.C., the mail fraud statute.

The defendant, Peter C. Unger was found by the trial court to be an indigent and an attorney was appointed to defend him. Prior to the commencement of the trial, motions were made to sever his trial from the other defendants, to sever the counts in the indictment and to transfer the case to the District Court of California, Southern District. The defendant, Peter Unger resided in San Diego, California with his family and had never been in Oregon prior to the trial.

The defendants agreed at the pretrial conferences that a motion or objection by one defendant would be considered a motion or objection by all of the defendants, unless otherwise specified.

The government called 109 witnesses, Defendant Christensen called 1 witness, Defendant Robert Wagner called 4 witnesses and also testified himself, and defendant Peter Unger called no witnesses but testified himself. All the witnesses called by the defendants had been subpoenaed by the government. The Court refused to grant the defendant's motions to pay the costs of subpoenaing various witnesses and to allow travel expenses to interview these witnesses.

Prior to the trial the charges against William A. Shubin were dismissed and Alvin R. Stewart entered a plea of Nolo Contendere to Count I.

On the 7th day of trial, the court accepted the plea of Nolo Contendere to all counts of the indictment with the exception of Count 12 (dismissed) in behalf of defendant Coleman Christensen. On the 9th day of trial, Gordon Jongeward entered a plea of Nolo Contendere to Counts 1, 11, 13, and 14. On the 11th day of trial the charges against Andrew Kosieres were dismissed. On the 13th day of trial, the government dismissed all charges against the three corporations, namely: Golden Rule Realty and Development, Inc., GRR Development, Inc., and Pioneer Mortgage Bankers. When the case was submitted to the jury, only the defendants J. Wagner, R. Wagner, and P. Unger remained in the case.

IV. STATEMENT OF THE CASE

Trial of this matter commenced on July 18, 1967, and was concluded on August 4, 1967. The government called 109 witnesses. Defendant, Christensen, called one witness before he plead nolo Contendere. The defendant, Robert Wagner called 4 witnesses and also testified himself. The defendant, Peter Unger, called no witnesses but testified himself. All the witnesses called by the defendants had been under subpoena by the government. The defendants, requested that witnesses be subpoenaed and also for travel funds to interview witnesses (Clerk's transcript 134 et. seq.) The court denied the motions. At the pretrial proceedings apparently the parties agreed that a motion by one was a motion for all, unless specified to the contrary. (R. T. p. 15, 1596)

Defendant Peter Unger is a real estate broker, duly licensed, as well as a real estate investor and dealer, in the State of California. He met John Wagner in 1962 and acted as a broker for Mr. Wagner occasionally and also bought and sold properties between themselves, for a total of between 30 and 50 transactions, primarily in the Elsinore, California area.

In the first transaction in the Elsinore are, he acted as a broker for Mr. Gregory in the sale of 89 acres to Mr. Wagner for around $49,000 to $42,500. The terms of sale were $3,500 cash down. All of the property was paid off except $1,900. Another purchaser paid $3,500 per acre from Mr. Wagner for about one-half the acreage. The property was approximately in the same area as the land agency tract.

Prior to the sale by Mr. Gregory to Mr. Wagner he had been attempting to buy the property for his own account.

Many properties were purchased by J. Wagner while he was in Elsinore, California, and several of these properties were sold to various people in parcels and as individual lots. Unger purchased a number of these lots from J. Wagner, receiving a grant deed and as part of the purchase price giving a note secured by a deed of trust on the lot purchased back to J. Wagner. The first property where this took place and which is purported to be a part of a scheme to defraud is property which was owned by Pearl Rupard.

RUPARD PROPERTY

Unger was working as a broker in Elsinore. He learned of property offered for sale by Pearl Rupard through another realtor. He contacted John Wagner and an offer was made. He represented J. Wagner and Redmond Realty Company represented Pearl Rupard. The property was purchased by J. Wagner on November 6, 1963, and is sometimes referred to as the Land Agency Tract. It is located in Elsinore. Over one year subsequent to the purchase, on November 30, 1964, J. Wagner sold a portion of this property to Unger. He took back as the consideration, notes secured by trust deeds on the individual lots sold in the amount of $1,250. These lots were legal lots and were part of an earlier subdivision. There was an existing trust deed on this property which was a blanket lien on the individual lots which were deeded to Unger. Unger testified that J. Wagner stated that he would clear the existing lien on the property so that Unger would own the lots

subject only to the trust deeds in the amount of $1,250 each. Apparently this was never done, and Unger made no attempt to pay on the notes secured by the trust deeds nor did he attempt to sell the lots he had acquired from J. Wagner. There was no personal liability that Unger had since the notes were part of the purchase price and the sole security was the property.

In early 1965, J. Wagner left the Elsinore area and went to Arroyo Grande, California, where he became associated with C. Christensen and Jongeward, who owned Golden Rule Realty Company. These three pooled their assets, with J. Wagner putting the Unger trust deeds, as well as many other properties, into the venture, and the three of them operated GRR as a partnership. Arroyo Grande is approximately 300 miles from Elsinore. Subsequently, in September or October of 1966, almost three years after Unger executed the notes, the corporation transferred these notes to shareholders of Aloha Estates, as part of a modification agreement between the parties, after GRR had purchased property from Aloha Estates and it was discovered that Aloha Estates had misrepresented the encumbrances on the property it had transferred to GRR.

Unger was not an officer, director, employee, agent, or owner , nor did he have any other representative capacity with GRR. He never represented GRR in any transactions nor did he ever receive any money from this organization. He did purchase Aloha Estates from this organization.

While Unger was in Hawaii he was approached by a Mr. Brown who demanded payment on notes that Unger was obligated on. Unger testified that he was surprised and didn't know what Brown was talking about, but paid $20 so that he would not be talked about as one who didn't pay his debts. He then checked and for the first time learned that the notes that he had signed were traded by J. Wagner and GRR. He learned that the prior encumbrance had been foreclosed, told J. Wagner this and told anyone who asked him thereafter, the same thing, stating that the notes were entirely worthless. Unger in no way represented to anyone that he would pay the notes prior to their being traded by J. Wagner and GRR.

PAONESSA PROPERTY

J. Wagner bought property in the Elsinore area from Peonessa in July of 1963. The property consisted of a total of 48 lots. J. Wagner apparently sold some of these lots to Garth Slate and to Peter Crystall, and approximately one and one-half years after he bought the property, sold some lots to Unger, on January 15, 1965. These lots were sold and the consideration paid by Unger was notes in the amount of $7,500 for each lot and secured by trust deeds on these individual lots.

On August 7, 1965, GRR traded one trust deed in the amount of $7,500 upon which Unger was obligated, together with three trust deeds where Crystall was the obligor, to Barkdoll. Apparently GRR had guaranteed payments on these notes to Barkdoll, as he collected from GRR for two months after no payments were forthcoming from

the obligors of the notes. Unger never communicated in any manner with Barkdoll.

MUTUAL BENEFIT TRACT

J. Wagner purchased property from Carl Evans on December 11, 1963. Wagner sold lots from this parcel to various people including Don Vance and Garth Slate and on January 15, 1965, over one year subsequent to his purchase of the property, sold some lots to Peter Unger, and took back notes secured by trust deeds on the lots in the amount of $1,250 each.

On February 9, 1965, J. Wagner traded five of these Unger notes to Charles Shorts. Unger was never contacted in this regard and did not learn of same until the trial. Apparently Shorts made no investigation of the property and had a guaranty of payment.

In summary this is the sole connection Unger has had with any of the notes he signed after he gave same to Wagner. There is no testimony from anyone that these notes were not precisely what they purported to be, that is purchase money mortgages. The only thing that apparently was misrepresented by J. Wagner, and his associates, other that the value of these notes, was that the notes traded to the stockholders of Aloha Estates showed payments on same. However, this may not have been a misrepresentation as Wagner owed Unger some money and he may have credited the debt by payments on the note, as he did with Stewart. Of course, Unger had nothing to do with Wagner's records.

On only one occasion did Unger transfer any of the

securities that are the subject of Count I. Unger had obtained as a commission from Wagner two $3,000 notes secured by a trust deed on property in Elko, Nevada. These notes were executed by GRR and were payable to J. Wagner, who assigned same to Unger. Unger traded the note to Langston as partial consideration for the purchase of a house.

OTHER EVIDENCE

Many witnesses testified with respect to false financial statements being issued by J. Wagner and the three defendant corporations that J. Wagner, Christensen and Jongeward were associated with. Also, there was much testimony with respect to transactions other defendants entered into where the notes executed by Unger were not used and where he was not mentioned, i.e., in Amarillo and El Paso, Texas; Denver and Pueblo, Colorado; Las Vegas, Nevada; Albuquerque, New Mexico; South Gate, California; and McMinnuille, Portland, Kimberly, Lebannon, Monument and Fossil, Oregon.

Testimony was introduced concerning transactions entered into with J. Wagner, GRR and Christensen by Unger. These transactions did not involve the use of securities or the mails and their only apparent relevance is to show that the parties did have some business dealings with each other.

The dealings with J. Wagner after he left Elsinore were very few. J. Wagner sold Unger property acquired from Irma Harris on January 21, 1965, the Harbor Lights Apartments, as well as some

duplexes on the same date also acquired from Irma Harris.

Unger purchased a house from Mr. Langston through a broker, Mrs. Shackleford, and then sold the property to Christensen. He purchased apartments from GRR on May 28, 1966, that had been previously purchased from Chesney.

V. QUESTIONS PRESENTED

A. THE TRIAL COURT ERRED IN NOT GRANTING A SEPARATE TRIAL FOR PETER C. UNGER BASED ON MISJOINDER UNDER RULE 8 (b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

B. THE TRIAL COURT ERRED IN NOT GRANTING THE DEFENDANT PETER C. UNGER'S MOTION FOR A CHANGE OF VENUE.

C. THE TRIAL COURT ERRED IN FAILING TO FREQUENTLY ADMONISH THE JURY NOT TO READ NEWSPAPER ARTICLES NOR LISTEN TO RADIO BROADCASTS AND TELECASTS, NOR TO DISCUSS THE CASE WITH ANYONE.

D. THE TRIAL COURT ERRED IN NOT POLLING TH E JURY INDIVIDUALLY AS TO WHETHER OR NOT THEY HAD READ THE PUBLICITY CONCERNING THE TRIAL.

E. THE EVIDENC E WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE CONVICTION OF PETER C. UNGER.

F. IT IS A DENIAL OF DUE PROCESS OF LAW UNDER THE 6TH AMENDMENT OF THE U.S. CONSTITUTION TO FIND THE DEFENDANT GUILTY WHEN HE WAS NOT REPRESENTED BY REASONABLY EFFECTIVE COURT APPOINTED COUNSEL.

G. THERE WAS A MATERIAL VARIANCE BETWEEN THE PLEADING AND PROOF REQUIRING A REVERSAL AS TO DEFENDANT PETER C. UNGER IN THAT MULTIPLE CONSPIRACIES WERE ATTEMPTED TO BE PROVEN UNDER COUNT I.

H. THE TRIAL COURT ERRED IN NOT SEVERING THE TRIAL OF PETER C. UNGER FROM THE OTHER DEFENDANTS BASED ON PREJUDICIAL JOINDER UNDER RULE 14 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

I. THE TRIAL COURT ERRED IN ADMITTING ADMISSIONS OF PETER C. UNGER TO AN INVESTIGATING OFFICER, WHERE HE HAD NOT BEEN ADEQUATELY ADVISED OF HIS CONSTITUTIONAL RIGHTS.

J. THE TOTALITY OF THE ERRORS, INCLUDING PUBLICITY, CHANGE OF VENUE, MISJOINDER, INADEQUACY OF COUNSEL, VARIANCE, IF INSUFFICIENT STANDING ALONE, WHEN CONSIDERED AS A WHOLE DENIED PETER C. UNGER DUE PROCESS OF LAW AND THE CONVICTION SHOULD BE REVERSED.

VI. ARGUMENT

A. THE TRIAL COURT ERRED IN NOT GRANTING A SEPARATE TRIAL FOR PETER C. UNGER, BASED ON MISJOINDER UNDER RULE 8 (b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

The defendant was charged only in Count I, the gist of which is conspiracy to defraud by the use of securities in interstate commerce or by the use of the mails. Count XIV was a separate conspiracy charging other defendants with conspiring to defraud the United States, making flase statements to agencies of the United States and transporting in interstate commerce money obtained by fraud against the United States. It is clear that Count XIV is not alleged to arise out of the same transaction as Count I, since both counts are conspiracies and are allegedly different agreements and hence different transactions.

Count XV charged two defendants with making false statements in a matter within the jurisdiction of the Federal Housing Administration. These false statements are not part of the transaction Unger is alleged to have entered into. In none of the 64 overt acts listed in Count I, is it alleged that false statements were made to the Federal Housing Administration nor is making said false statements described at all in Count I. Similarly Count XVI charging two defendants with interstate transportation of converted property has no relationship with Count I, Such an act is not mentioned at all in Count I.

The charge in Count XVII of transporting converted property in interstate commerce that had been converted by fraud from

Carl Christensen, has no relationship with Count I nor is Unger in any way connected with same.

The money obtained from Carl Christensen was obtained by GRR from the sale of cattle. The government alleges it was a sale by fraud in that GRR represented that the cattle was not mortgaged whe in fact it was mortgaged. GRR had obtained the cattle from Edna Dick of Kimberley, Oregon, in exchange for an unsecured promissory note of GRR on February 16, 1966. No mention whatsoever is made in Count I about this transaction or even about the means whereby GRR obtained the cattle. It therefore, clearly is not part of the same transaction as Count I.

Rule 8 (b) provides:

"Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

Joinder of defendants in violation of Rule 8 (b) is reversible error regardless of any prejudice shown to the defendant. It is per se prejudicial (8 Moores Federal Practice 8-41: United States v Foster, (SDNY 1948) 80 F. Supp. 479;)

The joinder of defendants and offenses totally unconnected is prohibited by Rule 8 (b). This is not a matter of discretion. (United States v Spector, (C.A. 7th 1963) 326 F2d 345.

Each defendant must be alleged to have participated in the same transactions or series of transactions in which all of the other defendants have participated. Where multiple defendants are involved Rule 8 (b) requires that each count of the indictment arise out of the same series of acts or transactions which all of the defendants have participated. Williamson v United States, (CA 9th 1962) 310 F2d 192)

The case of Cupo v United States, (CA D. C. 1966) 359 F2d 990, is somewhat similar to the instant case. A conspiracy had been charged and defined as obtaining merchandise on credit from certain stores by false statements about employment, followed by the return of much of the merchandise for cash. The defendant, Carbonero and another were also charged in one of the substantive counts with obtaining automobiles by false pretenses. The court determined it must reverse even if no special prejudice appeared and stated: "The offenses of getting automobiles by false pretenses were not charged in the indictment as overt acts in the conspiracy and were not introduced in evidence as parts of the conspiracy although the conspirators planned that merchandise obtained from stores would not be paid for and much of it would be returned for cash, there is no evidence of an intent not to pay for the automobiles. Moreover, ..."

The conviction of the defendant Peter C. Unger should be similarly reversed without any showing of prejudice because of the misjoinder pointed out above.

B. THE TRIAL COURT ERRED IN NOT GRANTING THE DEFENDANT PETER C. UNGER'S MOTION FOR A CHANGE OF VENUE.

Defendant's motion to move the trial of the case to the United States District Court of California, Southern District made a showing that Unger lived with his family in San Diego, California, that the trial would be lengthy, that the majority of witnesses were from California, and that he was not in financial condition to move to Oregon. (Tr. Vol. I, Clerk's record p. 116) The allegations in Count I of the indictment clearly showed that Unger's primary involvement was alleged to have occured in California when he signed trust deeds on properties located in Elsinore, California. His financial status had been verified by the court when he was declared to be an indigent. The complexity of the indictment and the number of defendants involved clearly indicated that a long and complex trial would be necessary.

In Travis v. United States, 364 U.S. 358, the court stated that factors such as defendant's place of residence, expense and trouble to be caused by trial in a far removed district and in transportation of witnesses, volume of records and difficulty of moving them, economic loss to be suffered by an extended period away from one's place of work, and advantage of being able to provide the jury with views of immovable exhibits, if permitted by the court, should all be considered in determining whether a case should be transferred to another district.

It appears that all of the factors mentioned by the court were strongly present in this case and it was an abuse of discretion for the court not to change the venue of this case.

C. THE TRIAL COURT ERRED IN FAILING TO FREQUENTLY ADMONISH THE JURY, NOT TO READ NEWSPAPER ARTICLES NOR LISTEN TO RADIO BROADCASTS AND TELECASTS, NOR TO DISCUSS THE CASE WITH ANYONE.

The first indication of knowledge by the Court of the high publicity value of the indictment and the extensive newspaper, radio broadcasts and telecast coverage already given the case prior to trial, and the probability of further coverage during trial, is indicated by the order given by the Court on March 30, 1967, over three months before the trial started, that the government suppress publicity in this case (Tr. Vol. I, Clerk's Record p. 116).

On the first day of trial, July 18, 1967, after the jury had been empaneled and sworn, the Court admonished the Jury as follows: "Fastidiously avoid any broadcasts and newspaper accounts of the trial. You need not feel that you will get valuable information from those sources that you won't get here, because you will recall again that this is sworn testimony, and information from the outside would only be detrimental to a fair evaluation of this case." (Tr. 4)

Again, after opening statements the Court stated, "Please do not discuss the case, and remember the other admonitions I have given you." (TR. 9)

The next morning of trial, before any witnesses took the stand, a defense attorney introduced two newspaper articles as Exhibits (Tr. 13), and moved for a mistrial and asked for an individual polling of the Jury (Tr. 4) in view of the fact that the newspaper articles in the

Oregon Journal and also in the Oregonian, newspapers with a broad general circulation in the State of Oregon as well as in Southwest Washington (Tr. 13) printed articles one of which contained the following language: "A companion 61-page indictment charged two defendants perjured themselves when giving sworn answers to questions of Ass't. U.S. Attorney, Roger G. Rose in the civil portion of the prosecution."

Trial attorney for Peter C. Unger joined in the motion (Tr. 18-19):

"The Court: "Ladies and Gentlemen of the Jury, the Portland Press, as was expected, did publish some matters concerning this case. There is nothing wrong with that in and of itself. However, the articles were not entirely accurate, and had you read them and believed them, it would be a matter unfairly prejudicial to some of the defendants in this case. Of course, I have asked you not to read them, but I do want to know whether any of you did? (No response.) All right, then I assume that none of you have read the articles or none of them have been discussed in detail by you or your husbands or other family members or any other person. If this isn't the case, please let me know. (No response.)"

The Court in so stating ruled that the articles were definitely prejudicial, if read and believed. The motion of the Court before trial for the government to suppress publicity in this case is further acknowledgment that the case and the defendants had high publicity value.

In United States v Acardo, 298 F2d 133, 136 (1962) the court

stated as follows: "The jury separated each night and was exposed to the prejudicial publicity. In view of that fact and of defendants publicity value, it was essential that the judge frequently, prior to separation, call the attention of the jurors specifically to the possibilitites of newspaper accounts carrying statements of facts about the case."

"What is said here applies with equal force to radio news broadcasts and telecasts."

And further in United States v Acardo supra, in the concurring opinion, at page 140: "...I believe that as a minimum the trial judge should have frequently repeated the admonition given on the first day of trial. Under somewhat similar circumstances, some trial judges have adopted the practice of giving such an admonition at the close of each days session of trial. This is a good practice.

The following is every admonition given by the court to the jurors at the conclusion of each day of trial, as to publicity, the reading of newspapers, the listening to radio broadcasts and telecasts and the jurors discussing the case with anyone:

1st day, Tuesday, July 18, 1967. "Please do not discuss the case and remember the other admonitions I have given you." (Tr. 9)

2nd day, Wednesday, July 19, 1967. "Please do not discuss the case or form an opinion."

"Many people believe that when a judge tells the jury not to read the newspapers, that the first thing they do is rush out and start reading them. I don't believe that is true. I don't believe that is true, because you didn't the last time and because you took the oath to

try this case fairly, and you are not going to rush out to read the newspapers."

"Now I am not critical of the newspapers. I have no reason to be critical. They write the truth as they see it. I met the charming young man who is the reporter, and he told me that he had been a reporter for three months and had never been in the courtroom. Therefore, there are going to be some inaccuracies, and if those inaccuracies are read by you people, they will not serve the cause of justice. Somebody will be treated unfairly. That is not sworn testimony, and it is fine for a purpose. But the purpose isn't evidence in this case. So make a studious effort, if you will, and I ask you again to avoid reading or listening to conversations or news broadcasts about this case." (Tr.191)

3rd day, Thursday, July 20, 1967. "Please do not discuss the case or form an opinion." (Tr.463)

4th day, Friday, July 21, 1967. "Continue your practice, if you will, Ladies and Gentlemen, of avoiding publicity on this case." (Tr.726)

5th day, Monday, July 24, 1967. No admonition given. (Tr.986)

6th day, Tuesday, July 25, 1967. No admonition given. (Tr.1251)

7th day, Wednesday, July 26, 1967, No admonition given. (Tr. 1466)

8th day, Thursday, July 27, 1967. No admonition given.

(Tr. 1648)

9th day, Friday, July 28, 1967. No admonition given. (Tr. 1828)

10th day, Monday, July 31, 1967. "Please avoid newspaper accounts of the trial and avoid television and radio broadcasts. Please do not discuss the case nor form any opinion." (Tr. 2094)

11th day, Tuesday, August 1, 1967. No admonition given. (Tr. 2399)

12th day, Wednesday, August 2, 1967. No admonition given. (Tr. 2625)

13th day, Thursday, August 3, 1967. "The admonitions that I have given you many times, those admonitions are all the more important at this moment, because you have heard all the evidence and all the arguments that you are to hear. But you have not yet heard the Court's instructions, so you don't know at this point the rules or standards to apply, nor even what your ultimate task will be. So it is not yet the time to form any opinions in the case."

"Please do not discuss the case, either among yourselves or with anyone else. Please do not read the public press. It is no reflection on the press to tell you that it would be prejudicial to one or more or perhaps all parties of this case for you to read it. It is not written for the same reason that the testimony is given here. It is not required that they write with the technical accuracies necessary in a trial of the case. Therefore, just simply avoid newspaper accounts or broadcasts accounts of the trial until it is over. Then, perhaps maybe your husbands or wives will save them for you, and you can

read them." (Tr. 2680)

The court, before trial, recognized the high publicity value of the case and ordered the government to suppress publicity. The court on the second day of the trial ruled that newspaper articles then published would, if read and believed by the jurors, be not probably prejudicial, but actually prejudicial to the defendant. The court was fully aware of the extensive and consistent newspaper coverage of the trial and the many articles written, and such is evidenced by the statement by the court at Tr. p. 2680: "...just simply avoid newspaper accounts or broadcast accounts of the trial until it is all over. Then perhaps your husbands or wives will save them for you, and you can read them then."

The court not only knew of the continued press coverage, but also of the reporters presence in the courtroom. This is shown by the court's statements regarding the introduction into evidence of certain exhibits. (Tr. 2373) The Court: "In the first place, I notice there are some Oregonian newspaper articles in there that I don't see are admissable. If the Oregonian reporter claims to have some specia knowledge about the facts of this case, then subpoena him. There is one in the room."

Aside from the admonitions given on the first, second and thirteenth days of trial, the court on four days gave but a weak perfunctory admonition and on seven days gave none at all.

Nor were there any admonitions given at any of the noon recesses when the jurors separated for a lunch break, (Tr. 74, 325,

584, 1112, 1328, 1771, 1952, 2288, 2500), nor did the court make any reference to the matter in his final instructions to the jury, or at any other time during the trial.

During the second week of trial, not a single admonition concerning publicity was given to the jurors, not even a cursory or perfunctory admonition, in fact not one word was said by the Court to the jurors concerning this matter, from Friday, July 21, 1967, until Monday, July 31, 1967, a period of ten calendar days.

The importance of frequent admonitions was emphasized in Coppedge v United States, 272 F2d 504, 506, where the court stated: "At the beginning of the trial, when the jury was first sworn, the court admonished the members that they must not discuss the case with anyone and that they would please keep an open mind until the trial was finished. The court did not mention newspapers or newspaper articles. The trial judge did not further admonish the jury at the end of the first day, or of the second day, or of the third day." And further, "The court made no reference to the matter in his final instructions to the jury."

That court further continued: "In Carter v United States, (102 U.S. App D.C. 277, 231, 252, F2d 608, 612 (1957).) We quoted from our opinion in Brown v United States, (99 F2d 131 (1938)): "... and in all criminal cases whenever jurors are permitted to separate the court should invariably admonish them not to communicate with any person or allow any person to communicate with them on any subject connected with the trial, and not to read published accounts of the court

of the trial."

"We added, in Carter: "The language we then used, 'the court should invariably admonish them', imposed upon the trial courts a requirement."

In Silverthorne v United States of America, 9th Cir. No. 21,221, decided August 27, 1968, the Court stated: "Despite the inability of the trial judge to prevent newspapers or other news media from being brought to the attention on a non-sequestered jury..., the trial court cannot assume that all is well, or that there is nothing he can do."

And further, "Jurors are not presumed to separate the truth from the falsity in newspaper articles concerning the trial in which they sit as judges of fact. The jury's impartiality must be kept free from 'any outside influence, whether of private talk or public print.'" Patterson v Colorado, 205 U.S. 454, 462. It is therefore the affirmative duty of the trial court to take positive action to ascertain the existence of improper influences on the jurors deliberative qualifications and to take whatever steps are necessary to diminish or eradicate such improprieties."

The trial court here failed in this requirement to make frequent admonitions to the jurors though the court was fully aware of the publicity attendant to the defendants and the trial. Further, the few admonitions given were not in the form of an order, nor were they forceful. The admonitions were a request to avoid publicity, implying that is some effort was made to avoid reading or hearing the publicity,

this was sufficient, even if despite these efforts some publicity reached the jurors.

D. THE TRIAL COURT ERRED IN NOT POLLING THE JURY INDIVIDUALLY AS TO WHETHER OR NOT THEY HAD READ THE PUBLICITY CONCERNING THE TRIAL.

On the first day of trial, after the jury had been empaneled and sworn, the Court admonished the jury as follows: "Fastidiously avoid any broadcasts and newspaper accounts of the trial. You need not feel that you will get valuable information from those sources that you won't get here, because you will recall again that this is sworn testimony, and information from the outside would only be detrimental to a fair evaluation of this case." (Tr. 4)

Again, after opening statements the court stated, "Please do not discuss the case, and remember the other admonitions I have given you." (Tr. 9)

The following morning of trial, before any witnesses took the stand, one defense attorney introduced two newspaper articles and asked for an individual polling of the jury, (Tr. 14) in view of the fact that the newspaper articles appearing that morning in the "Oregonian" contained the following language, "A companion 61-page indictment charged two defendants perjured themselves when giving sworn answers to questions of Asst. U.S. Attorney, Roger G. Rose in the civil portion of the prosecution."

The trial attorney for Peter C. Unger joined in the motion for a mistrial and the polling of the jury. In response to this motion the court addressed the jurors as follows (Tr. 18-19):

"The Court: Ladies and Gentlemen of the jury, the Portland Press, as was expected, did publish some matters concernin this case. There is nothing wrong with that in and of itself. However, the articles were not entirely accurate, and had you read them and believed them, it would be a matter unfairly prejudicial to some of the defendants in this case. Of course, I have asked you not to read them, but I do want to know whether any of you did? (no response) All right. Then I assume that none of you have read the articles or none of them have been discussed in detail by you or by your husbands or other family members or any other person. If this isn't the case, please let me know." (no response)

The fact of the perjury indictment, if known to the jurors without knowing that Peter C. Unger was not one of those named defendants indicated in the article, would have been particularly prejudicial to him. Peter C. Unger took the stand and testified on his own behalf and the newspaper article in question mentioning a perjury indictment could have greatly damaged the effectiveness of his testimony and prejudiced his entire case.

By preceeding the questions to the jury about reading the articles with, "of course I have asked you not to read them," the court effectively inhibited an honest and forthright response of any guilty juror, and thereby has committed error. In Coppedge v United States, D.C. Cir., 272 F2d 504, 508, (1959) the court stated: "It is too much to expect of human nature that a juror would volunteer, in open court, before his fellow jurors, that he would be influenced in

his verdict by a newspaper story of the trial." In the 1967 case of Mares v United States, 383 F2d 805, 809 (1967) the court quoted the Coppedge case and further stated: "The article was presented as a grounds for mistrial. The nature of the article was such that the trial court should have immediately ascertained whether any jurors had been exposed to it. This could have been done without any referenc to the nature of the article. It should have been done by a careful examination of each juror out of the presence of the remaining jurors."

In United States vs Accardo, 298 F2d 133 (CA 7, (1962)) the court states on page 136: "The judge's general admonitions at the beginning of the jury selection, his assumption of their effectiveness, and his instructions were inadequate protection. His general inquiry during the Voir Dire examination did not supply the deficiency. ("I ask each and every one of you, have you followed my direction in that regard?") There is no certainty that all jurors would volunteer information about violating the admonitions or admit that they were influenced by the publicity."

In the case of Don C. Silverthorne v United States of America, (9th Cir., Case no. 21,221, decided August 27, 1968) the court quoted as follows:

"The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any out side influence, whether of private talk or of public print." Patterson v Colorado, 205 U.S. 454, 462, 27 S. Ct. 556 (1927)

"Our system of law has always endeavored to prevent even the probability of unfairness." In re Murchison, 399 U.S. 133, 136, 75 S. Ct. 623 (1955).

"The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. Holt v United States,' 218 U.S. 245, 251, 31 S. Ct. 2 (1910)

But discretion is not a substitute for duty.

"Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to insure that the balance is never weighed against the accused." Sheppard v Maxwell, 384 U.S. 333, 362, 86 S. Ct. 1507 (1966)

"No doubt each juror was sincere when he said he would be fair and impartial...but the psychological impact requiring such a declaration before one's fellows is often its father." Irvin v Doud, 366 U.S. 717, 728, 81 S. Ct. 1662 (1961)

"... that the fact that they did not respond to the court's general inquiries does not establish that the publicity could not have prejudiced any members of the jury." Henslee v United States, 246 F2d 190 (5th Cir. 1957)

In view of the Court's statement that newspaper articles were expected, the court's determination that had the juror's read this article it would have been unfairly prejudicial, and the court's remarks inhibiting a forthright answer from a juror, individual

interviews should have been held to overcome the reluctance to speak out. As stated in Coppedge v United States, 272 F2d 504, 508 (D. C. Cir. 1959) "...

[T]he Court should...(make) a careful examination of each of the jurors involved, out of the presence of the remaining jurors, as to the possible effect of the articles."

The article here in question is one from which prejudice might arise. Once this article was brought to the attention of the court, the government had the bruden to establish that no juror had the matter brought to his attention. Calo v United States,338 F2d 793, 795 (1st Cir. 1964). No such showing was made by the government in this case.

E. THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE CONVICTION OF PETER C. UNGER.

Count I charges Unger and the other defendants with conspiracy to violate (a) the anti-fraud section of the securities act, and (b) the mail fraud statute. The gist of the charge in Count I is that Unger agreed with the other defendants to defraud private people of property through the sale of fraudulent securities, accomplished through the use of means of interstate commerce or the mails. The proof must show that Unger knowingly and will fully participa ted in some phase of the overall scheme to defraud.

The evidence of knowledge must be clear, not equivocal. Direct Sales Company v United States, 319 U.S. 703.

He must be shown to have at least the degree of intent necessary for the substantive offense itself. Ingram v United States, (1959) 360 U.S. 672, 678, 79 S.Ct. 1314, 3 L.Ed2d 1503; Mazurosky v United States, (9th Cir. 1939) 100 F2d 958; Phillips v United States, (9th Cir. 1965) 356 F2d 297.

"...Constructive notice or knowledge of a circumstance, based upon actual knowledge of a co-conspirator, agent or employee, has no tendency, circumstantially or otherwise, to prove criminal intent." Phillips v United States, supra at 303.

Mere knowledge or approval of or acquiescence in object and purpose of conspiracy without agreement to cooperate to accomplish such object or purpose is not sufficient to constitute one a party to conspiracy. Court reversed conspiracy conviction to violate Internal

Revenue law relating to intoxicating liquors where she lived in the house on the premises where the still was located and hurriedly withdrew when the still was burned. However, there was no evidence that she had anything to do with the manufacture of the intoxicating liquor. Jones v United States (19th Cir. 1966) 365 F2d 87.

A co-defendant who was on the scene of events which positively or by fair inference could be deemed part of moonshine liquor distribution conspiracy but who was not linked to any integral element of the plan except by presence and association was not guilty of conspiracy to possess and transport nontax-paid whiskey. Neither association with conspirators nor knowledge that something illegal was going on by themselves constitutes proof of participation in conspiracy. United States v Webb, (6th Cir. 1966) 359 F2d 558.

"Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it... If later comers change that he is not liable for the change; his liability is limited to the common purposes while he remains in it." United States v Peoni, (2nd Cir. 1938) 100 F2d 401.

1. UNGER"S EXECUTION OF NOTES

In 1962 and 1963 Unger and J. Wagner got together and Wagner, having purchased property in the Lake Elsinore area, sold a portion of the property to Unger (Tr. 2339), for which Unger executed notes and trust deeds. The notes executed by Unger were genuine and not sham securities. They were valid legal security interests in lots that Unger in fact owned. They were not valueless.

Unger's testimony is that he was purchasing the lots and that John Wagner agreed to pay off the entire encumbrance on the property so that Unger would own the lots down to a first trust deed (TR 2343). At that time his notes would be the sole encumbrance on a legal lot, close to a lake recreational area. Unger bought the land as a speculative venture -- if the land values had continued skyrocketing, Wagner would have paid off the first trust deeds and Unger would then pay Wagner on the second trust deeds, which would now be first trust deeds. Thus Unger would have an interest in the land and Wagner would have valuable first trust deeds. However, the market collapsed, land values in the area dropped (Tr. 406), so Unger paid nothing on the trust deeds as he knew that there was no equity in his lots when J. Wagner failed to pay off the blanket encumbrance, which Wagner failed to do apparently because of the drop in land values.

According to Unger, the $1,250 notes he executed would have been the sole encumbrance on the lots which would be worth more than the trust deed (Tr. 2343). If the minimum value was deemed to be less than $1,250, then Unger would have no real value in the lots. It is to be noted that Unger never traded the lots, and that the trust deed of $1,250 had some value, which would be approximately the value of the lot for which the security for the note.

Unger must have intended to enter into a conspiracy to defraud property owners of their property by misrepresenting to these property owners that notes secured by trust deeds were valuable. Since he did not directly make any misrepresentations, he must have agreed

with John Wagner that Wagner would misrepresent the value of the land that was secured by the trust deeds, as well as any payments that may or may not have been made by Unger. The only plausible reason for this agreement would be that Unger would get part of the proceeds from the fraud perpetrated by John Wagner on property owners by misrepresenting the value of the notes secured by trust deeds executed by Peter Unger. The evidence is completely devoid of any showing that Unger participated in the profits of the purportedly defrauded people. Unger did not in any way participate in the sale or trading of these notes secured by trust deeds which were owned by John Wagner and or his assignees. The government exhibits and sequestration of all books and records of the three defendant corporations failed to reveal that Unger ever received anything from these corporations. Further, Unger was never an officer, director or shareholder of said corporations.

2. ASSUMPTION OF INITIAL CONSPIRACY BETWEEN UNGER AND J. WAGNER.

If it be assumed that Unger signed the notes and agreed with John Wagner that Wagner would misrepresent the value of the notes to third parties, that Unger would participate in the profits so that Unger could be said to have a concert of purpose with Wagner, the conspiracy would be limited to the actions of John Wagner transferring the notes to third parties. There would be no agreement to bring additional parties into the arrangement and share the profits with them. John Wanger's transferring these notes to GRR and other corporations he had an interest in, with his co-partners Christensen, Jongeward and others

but not Unger, would then have the effect of terminating the Unger-Wagner conspiracy.

In the case of United States v Peoni, supra, Peoni sold counterfeit bills to Regno who sold the same bills to Dorsey who was arrested trying to pass them to an innocent party, all three parties having knowledge that the bills were counterfeit. Peoni's conviction was reversed on the grounds that his knowledge that further sales were likely was insufficient to connect him with the remote vendee. The court reasoned that Peoni's utterance of the bills was indeed a step in the casual chain which ended in Dorsey's possession but that was all. The law is unsettled whether or not a seller knowing the buyer's criminal purpose is a conspirator with him. However, no one has held that a contract is criminal because the seller has reason to know, not that the buyer will use the goods unlawfully, but that someone further down the line may do so.

A distinction was drawn in the subject case between knowled that remote links must exist and knowledge that they may exist, with liability restricted to the former situation. If it be conceded that the notes secured by trust deeds executed by Unger were sham when he delivered same to J. Wagner, since Unger had no knowledge of when or how or to whom these trust deeds would be negotiated by Wagner, his connection with purchasers of these instruments would be remote.

The court further reasoned that assuming Peoni and Regno agreed that Regno should have possession of the bills, it is absurd to say Peoni agreed that Dorsey should have them from Regno.

In the instant case, assuming argumento that Unger and J. Wagner agreed to execute sham notes (counterfeit securities) and that Unger was given something of value by J. Wagner in consideration of Unger executing same, and Unger knew that J. Wagner would transfe these sham notes to GRR and GRR would transfer same to innocent parties, there is no conspiracy since there is no concert of purpose.

The evidence is that no other defendants executed trust deeds and then traded them again, indicating the relationship with Unge to be unique. The other defendants did trade trust deeds executed by other parties who are not defendants and Unger is in the exact same position of these innocent parties, i.e., he simply bought property and executed purchase money trust deeds back to the seller, John Wagner.

Wagner was the owner and had complete control over the no and trust deeds. Unger had no legal right to these notes and absolutely no way to direct Wagner or his confederates in disposing of same. There is no evidence even inferring that Unger had a proprietary interest in these trust deeds.

The inference that Unger remained a participant in the profits to be realized by Wagner and his confederates, trading the notes secured by trust deeds executed by Unger, by misrepresenting their value, is devoid of reason. Any misrepresentation would harm Unger since he was the obligor on the notes. He would be a debtor who, in effect, operated in league with his creditor, Wagner and his assigns, to convince third parties that Unger was a good credit risk. Unger then ends up with the property which is an immediate

embarrassment to him. There is no necessity for Wagner to do this since the property itself could be traded with the same convincing' force as trading the trust deeds, since the property is the only security for payment on the notes.

It is to be considered that a good deal of time passed from 1962 and 1963 when Wagner purchased the lots, to when he sold them in 1964 and 1965.

Even after the lots were sold to Unger and trust deeds created, one to two years passed before Wagner traded the trust deeds. And this was not only with Unger's trust deeds, for Wagner did not deal exclusively with Unger, but also with Garth Slate, Don Vance, Alvin Stewart and others in selling lots and securing notes and trust deeds.

The fact that property owners did not rely upon the notes and trust deeds as a material consideration in their trading and selling to GRR, Wagner and Christensen, is indicated by the following: 1) Failure to secure title policies; 2) failure to record the trust deeds after accepting them; 3) failure to contact the obligor prior to their sale to verify an indicated payment record; 4) admissions of parties that they relied basicially upon the statement of the great financial assets of GRR and John Wagner; 5) failure to investigate the land upon which the trust deeds applied, and a general apathy on the part of many of the holders of Elsinore trust deeds. Almost no effort was made by parties to investigate before taking the trust deeds, nor to pursue actively to collect or foreclose upon the property.

Some of these supposedly defrauded parties were just plain anxious to unload their financially distressed properties for any kind of deal at all, including trust deeds some of which had become worthless through foreclosure, thus the fact that Unger executed notes was immaterial.

Sometimes it was indicated that payments had been received on the notes. It is to be noted that the records were all John Wagner's records, and the entries all Wagner's entries.

If John Wagner and Unger were acting together, Unger surely would know what Wagner was doing. It is incredible to assert that Unger conspired with Wagner and other defendants to trade notes that Unger was obligated on, when Wagner's statements to third parties was not what Unger stated and when there was great embarrassment caused to Unger by Wagner's statements and actions.

3. TRANSFER OF NOTES EXECUTED BY UNGER

The testimony is that notes and trust deeds on Lake Elsinore property where Unger was the obligor were given the following parties: 1) Aloha Estates Investors; 2) Robert D. Haney; 3) Charles Shorts and 4) Dr. George Barkdoll. A short analysis of each of these transactions and lack of involvement by Unger is as Follows:

ALOHA ESTATES:

Aloha Estates was a large subdivision project in Hawaii owned by three Hawaiian corporations. In the spring of 1965, the project was selling poorly, obligations were coming due which could not be met, and things were quite distressed.

Aloha Estates was on the v erge of bankruptcy (Tr. 863, 2461, 2462).

Aloha Estates was sole to GRR on May 1, 1965 (Tr. 866), GRR assuming its obligations and giving a second mortgage of $203,70 (Tr. 855). Subsequently it was determined the title given by Aloha Estates was deficient, clouded by Internal Revenue Liens, and in an impasse situation wherein GRR refused to make its payments or to rescind the entire sale. A secondary compromise agreement was reached wherein GRR demanded the majority stock in the three corporations which owned Aloha Estates for .50 on the dollar, in exchange for Lake Elsinore trust deeds. One of the shareholders inspected the Lake Elsinore area and recommended the exchange, due consideration being given to the misrepresentation of title by Aloha Estates and the possible liability thereby incurred.

In September 1965 GRR gave the Hawaiian shareholders the notes and Lake Elsinore trust deeds, upon which Peter Unger was obligated to make payments, said trust deeds executed November 30, 1964; however, some lots had been foreclosed upon by a prior mortgagor in mid-1965. Peter Unger had no knowledge of the details of the Aloha Estate sale and compromise agreement for he was not associated with GRR.

About December 1, 1965, Unger accepted an offer from John Wagner to go to Hawaii as president of Aloha Estates and to attempt to straighten out the financial difficulties of that project. Unger was to get 50% of the profits made from Aloha Estates. Later in December GRR sold all of its interest in Aloha Estates to Unger.

John Wagner did not tell Unger that GRR had given the Hawaii people worthless notes and trust deeds of Lake Elsinore lots on which Unger was the obligor, worthless only because at that time some of the lots had been foreclosed upon.

John Wagner and Christensen completely undermined Unger's position as president and owner of Aloha Estates and his attempts to breathe solvency into that project, by giving the former owners of Aloha Estates these trust deeds which they knew to be worthless, and by indicating on some that Unger had and was making payments, when he had not and was not. It is possible that Wagner cou have credited Unger for monies owed by such credit on some notes, but not on notes and trust deeds which had already been foreclosed upon. This made Unger look like a fool, trying to refinance and save the Aloha Estates project yet apparently being the deliquent obligor on numerous trust deeds. It was as much a fraud upon Unger as upon the shareholders of the Aloha Estates Corporations. All of this is further evidence of a lack of any agreement or conspiracy between Unger and John Wagner to defraud others.

The testimony shows that when Hawaiian persons such as Mr. A. Lee Brown and Mrs. Harvey King contacted Unger and asked about payments on Unger notes and trust deeds, Unger made two payments to Brown (Tr. 909), and advised Mrs. King he would make payments to her as soon as he checked with Wagner about the validity of the trust deeds (Tr. 1209). This is consistent with Unger's testimony all along, that Wagner could have paid off the first trust

deeds and made payments on the seconds for monies owed Unger, and thus the trust deeds would have good value. During this time Unger had no knowledge or control of the notes and trust deeds or of any misrepresentations made by John Wagner.

On checking, Unger was told by Wagner that the trust deeds were good, indicating that there was value in them and that Unger should continue making payments. Unger rechecked (Tr. 2351), and found out the opposite, that they were valueless, since they had been foreclosed upon by a prior lienholder. (Tr. 2352) Since there was no present value in the trust deeds nor in the land Unger held title to, Unger made no further payments.

Thus when Unger discovered that he was president of a company not only near financial disaster, but purchased with worthless trust deeds with his name as the obligor, he told Wagner he wanted no more part of Aloha Estates; immediately left the whole situation.

Unger's telegram renouncing the entire situation was as follows: "The Aloha Estates deal too big for me. You and Robert Wagner received the money. I see no future in the deal except trouble for me. Will try to get you off the hook by sale to Robert Wagner. Prepare papers from you to Robert Wagner. I will not touch this deal." (Tr. 809, 2353)

The inference drawn by the government that Unger agreed ahead of time to share profits with GRR is not reasonable. Unger did not negotiate any part whatsoever of the sale of Aloha Estates to GRR. The original agreement of sale to GRR involved a second mortgage,

but no Unger trust deeds. It was only after it was discovered the Aloha Estates group had transferred clouded property that a modification was entered into by GRR to give Unger trust deeds for additional property, i.e., majority control of three Hawaiian corporations owning Aloha Estates. GRR had sold the major asset of Aloha Estates, by selling a second mortgage, before selling the near worthless balance to Unger. Nothing in the transaction indicates that Unger collaborated in any manner with John Wagner and/or his associates in the purchase of the Hawaiian property.

ROBERT D. HANEY Property, two duplexes in Portland, Oregon:

In November of 1965 Robert Haney sold to GRR two duplexes. Haney relied considerably on the financial statement of GRR shown to him, and in the agreement signed by J. Wagner, sold his property for an assumption of the two existing mortgages and a $7,500 note and trust deed on Lake Elsinore property. Peter Unger was the obligor on the note.

Haney checked with the title company, and found that the note previously had been assigned. Christensen, on demand, delivered a replacement note to Haney, upon which Unger again was the obligor. A title check again by Haney showed that this one also had previously been assigned. Christensen then replaced the second note with a third Unger note and trust deed.

Another check revealed that there was a defect in the title description of this third trust deed. Haney contacted Christensen, who stated he would see about getting this corrected by a new trust deed.

The original was from Unger to J. Wagner, then assigned to GRR, then to Haney. Haney contacted Unger who replied that he would gladly cooperate but Unger was never contacted by Christensen or J. Wagner to sign a corrected trust deed.

Such actions clearly show that GRR and its partners were extremely negligent and loose in trading trust deeds for property, and there was certainly some degree of carelessness in the parties they dealt with in failing to check the validity of the trust deeds before deeding their property away. It is quite conceivable that representations with respect to trust deeds Unger had executed were honestly made, and that misunderstanding arose due to negligence of J. Wagner and his associates other than Unger.

THE CHARLES SHORT'S PROPERTY. Shorts owned a motel in Pismo Beach, California. One of the defendants, Alvin Stewart, talked Shorts into trading his motel to John Wagner for some Lake Elsinore trust deeds. Stewart represented that the trust deeds were "as good as gold," (Tr. 140). On February 9, 1965 Wagner gave the Shorts a note and trust deed on which Unger was the obligor (Tr. 153). The notes did not reflect that any payments had been made on the notes, although they had been created in November 1964, and thus were apparently three months delinquent (Tr. 154).

Shorts stated that he relied entirely upon the word of Stewart who said that even if Wagner did not make good on the notes that he, Stewart, would. This is interesting, for Unger and

not Wagner, was obligated on the notes. Shorts admits that Wagner was described to him as a wealthy speculator in land and further Shorts relied upon his trust in Stewart to protect his interests, and not in the trust deeds. Any loss Shorts suffered was from his misplaced trust, not from any alleged conspiracy on the part of Unger with others. There is no evidence that Unger received any benefit whatsoever from this transaction, or that he even knew about it.

BARKDOLL PROPERTY. Dr. Barkdoll listed his property for sale in October 1964 and entered into an exchange agreement with GRR August 7, 1965. The fact that persons dealing with GRR in trading their properties for trust deeds on Elsinore property were not looking to the face value of these trust deeds is here indicated where in lieu of $5,000 cash, Barkdoll agreed to accept $10,000 in Elsinore trust deeds (Tr. 653).

Barkdoll in selling his property to GRR made no investigation as to the trust deeds. He did investigate as to the assets of GRR Development Company, finding out that it was a sizable organization, was purchasing ten million dollars worth of property in the Portland, Oregon area, and that they were purchasing the Hollywood Towne House luxury apartment building. He checked with the real estate commissioner of the state of Oregon and with Dun and Bradstreet (Tr. 653).

Barkdoll testified (Tr. 673), that when no payments were forthcoming on the trust deeds when due he contacted GRR and that

they made the payments direct to him, for both the first and the second months payments. This occurred after Barkdoll had mailed notices to the obligors on the notes and trust deeds to make payments directly to him. It is obvious that Barkdoll was looking to the financial ability of GRR rather than the obligors of the notes for payment. Of the four notes held, only on one was Unger an obligor. When the third and fourth payments were not made, Barkdoll went to Mr. Christensen (Tr. 676), and traded the notes back to GRR for an interest in real property. (Tr. 678)

This clearly indicates that GRR knew at the time they traded the notes and trust deeds that they were valueless, that the property secured by such was in the process of foreclosure, and that Unger and the other obligors were not expected to make any payments. Barkdoll did not look to the notes for payments. Their only value was in the representations of the financial assets and ability of GRR. Unger knew nothing of the transaction nor did he profit one cent thereby.

The notes secured by trust deeds signed by Unger were not actually securities within the meaning of section 77q since the California legislature has abrogated the common law liability attached to these notes so that there is no personal liability on same. Therefore, securities were not involved in the case of the notes executed by Unger. California Code of Civil Procedure 580 (a), 580 (b), 580 (d) and 726.

4. UNGER PROPERTY PURCHASES

On several occasions Unger purchased property from John Wagner and GRR Development Company, Inc.. These purchases were subsequent to the purported fraud on the sellers and there is no showing or inference that this aided or abetted a fraud. All defendants and third parties, by their actions and words, treated Unger as an independent purchaser, and Unger's own actions further reinforce this status. His letters to John Wagner stating "you" cheated Robert Wagner and Unger's letter to GRR stating that the deal was too messy for him and that he would help "you" out, negate any inference of Unger being a confederate, partner, joint venturer or other common schemer with the other defendants. (Tr.1009)

The entire modus operandi of John Wagner, Christensen, Jongeward and their three controlled corporations was to acquire property and pyramid upwards with all properties held in common by them. There is no distribution of properties among these confederates, but rather a constant attempt to build together. The dealings with Unger are completely apart from this pattern and hence these Unger deals were exactly as the parties indicated, i.e., arms length transactions.

Irma and Ellis Harris testified that they sold property to Wagner which was deeded to Unger. This transaction is apparently not one of the overt acts alleged in the conspiracy, although it does show some real estate dealings between Unger and

Wagner. A short analysis of this transaction is as follows:

THE HARBOUR LIGHTS Apartments owned by the Harris'. They owned an interest along with Christensen and sold their interest to Christensen, who sold the entire interest to Peter Unger. (Tr. 57). Unger shortly thereafter sold the apartments to John Wagner and received from Wagner a $45,000 note and trust deed in the transaction (Tr. 57).

This evidence shows only that the parties dealt with one another on specific deals. Unger was a speculator in property, buying generally with the sole intent to sell, not to hold for investment purposes. There is no evidence here to show a conspiracy between Unger and anyone to defraud. It was just an in-quick out-quick transfer of property, with Unger making a profit by securing the trust deed from John Wagner. It merely shows that the parties dealt with each other on certain specific occasions when a particular deal would be in the offering.

Seven duplexes owned by the Harris' were sold to John Wagner who assumed the loans against the property and in addition gave 9 trust deeds upon which D. D. Vance and Monica Vance were obligated to pay (Tr. 32, 47), Wagner then sold the property to Unger shortly thereafter and took back from Unger a trust deed in the amount of $18,000 (Tr. 67). There is no evidence of a conspiracy as to what each party intended to do with his property, and no tie in whatever with the alleged conspiracy in the indictment that Unger, Wagner and others conspired at some

indefinite time, presumably in 1963 or 1964, to issue worthless securities for the purposes of defrauding people. All the evidence here shows is a business like transaction between two businessmen dealing at arms length, who are both buyers and sellers of real property.

Mrs. Harris testified that there was a discrepancy on the name on the deed given to the escrow holder (Tr. 37). John Wagner, in purchasing the property with the intention of reselling it, in order to save escrow and title charges, apparently had the deed to him signed in blank so that when he sold the property he could simply insert the name of his buyer. When Unger bought the property from Wagner, Unger's name was placed on the deed. When Unger couldn't resell the property to others he sold it back to Wagner and received a second trust deed.

The transaction is not particularly unusual when it is remembered that both men were dealers in real estate, not investors, and all property purchased by either of them was simply inventory to be liquidated as quickly as possible. There is nothing collusive about the transaction. If the purpose was to create a second trust deed from Wagner to Unger, this could have been done simply by taking title in Wagner's name and Wagner creating a secon d trust deed to Unger, and no transfer of title to the property would have been required.

Ruth Chesney testified that she sold some apartments to GRR which GRR subsequently sold to Unger. A short analysis of

this transaction is as follows:

The Champion Oaks Apartments were sold to GRR for unsecured GRR notes, plus the assumption of the mortgages and debts on the property, May 12, 1966 (Tr. 2023). GRR sold the apartments to Unger May 24, 1966 (Tr. 2025). Here there is no connection whatsoever with the alleged conspiracy to issue fraudulent securities. This was a separate transaction, and GRR alleged that Unger still owed them money from that sale (Tr. 2033). There was nothing to show that the sale was not an arms length purchase If GRR defrauded Chesney, the sale to Unger in no way facilitated the fraud.

The transaction is inconsistent with collusion or conspiracy and merely shows two separate business sales of property to speculators, first to GRR, then to Unger. The government alleged that Unger didn't assume the rents as he promised GRR and that he stole the furniture (Tr. 2031). What Unger did with the property once he owned it has no connection at all with the alleged conspiracy to issue fraudulent securities and the introduction of said evidence was improper and highly prejudicial. Once the property was purchased by GRR the relationship with Chesney was fixed and if it was perfectly legal for GRR to sell the furniture then correspondingly GRR's purchaser, Unger, was completely free to sell the furniture.

THE SMITH-ALLISON PROPERTY. This consisted of an old 12 unit auto court in Oceano, California (Tr. 156).

Christensen contacted Smith with an offer to purchase the property, which was listed for sale at $100,000. Christensen apparently acted as a broker and that Unger would be the buyer (Tr. 159).

An escrow was entered for the sale in exchange for Elsinore trust deeds and escrow instructions were purportedly signed by Unger as the buyer (Tr. 162). Smith and Allison, on recommendation of their attorney, went to Elsinore to look at the property covered by the trust deeds. Fifteen of the offered trust deeds were in the Mutual Benefit Tract, 3 miles from the lake, and seven trust deeds were on the Paonessa property, about seven miles from the lake (Tr. 164). Apparently these trust deeds were not those that were signed by Unger. After looking at the property Smith attempted to contact Christensen to work out some kind of a deal but was never able to make such contact, therefore no sale was ever consumated.

This is just further evidence of land speculators and brokers trying to put together an exchange. It is in no way evidence of an alleged conspiracy to issue fraudulent securities.

This is the only transaction whereby any of the defendants purported to represent Unger in any fashion, be it broker, agent or otherwise. It is significant that Smith and Allison wanted to consummate an exchange with Unger, but were unable to communicate this desire to Unger via Christensen, thus inferring that no close relationship existed between Unger and Christensen. There is no transaction wherein third parties were ready and willing

to purchase properties from GRR of J. Wagner in exchange for trust deeds where the transaction failed to take place, thus once again pointing out that Unger was not a partner or joint venturer with the other defendants.

Further, Exhibit 42-A, although purported to be signed by Peter Unger, upon comparing his purported signature with his true signature on other documents, reveals that it is not in fact his signature. The fact that Unger's signature is not genuine clearly establishes why this transaction was not consummated and the fact that Christensen was not authorized to represent Unger as a broker or otherwise.

The evidence shows that John Wagner and his associates, Christensen and Jongeward, together with their three wholly owned corporations, made hundreds of offers on properties and used hundreds of brokers. Some brokers were used more than once. The fact that Unger purchased property on several occasions from these defendants and acted as a broker on other occasions is not unusual in view of the volume of property dealings by these parties. It is particularly not unusual as to Unger, since he was in the business of buying and selling property for his own account for many years as well as being a licensed real estate broker.

Apparently the prosecution is inferring that because Unger bought properties from these defendants he was conspiring with them even before they purchased the properties. This is a non sequitur. Once people were defrauded and title passed, what the

GRR principals did subsequently with the property in no way misled the original owners or assisted in perpetrating the fraud. Even if Unger knew the other defendants defrauded property owners, it is no inference that Unger conspired ahead of time to assist in the fraud. If Unger had conspired, what purpose was achieved by transferring title to the properties from GRR to him? If all were in a common enterprise the profits would have been divided when they were realized, either by holding the property and sharing the income or by selling the property to entirely independent parties and sharing the proceeds. To infer that eleven parties conspire to defraud a person of property, and ten of these get legal control of that property and then divest themselves by giving title and control to the eleventh person, does not make any sense. Property secured by GRR associates through their alleged fraud was never deeded to any of the other ten defendants, so the parcels sold and deeded to Unger are indicative of a legitimate sale rather than any prearranged scheme to parcel out properties obtained by the various defendants.

LISCHNER PROPERTIES. These were four deluxe homes in Beverly Hills (Tr. 243). Built by a speculator, they were in financial distress, the builder being unable to sell them or secure long term financing (Tr. 268). John Wagner purchased one of the houses with Elsinore trust deeds signed by Garth Slate (Tr. 246). Wagner told Unger of the houses, and Unger purchased three of them, by agreeing to assume the existing mortgages, bring

deliquent interest and taxes current, and give three notes of his own. (Tr. 255)

There is no evidence that this had any connection at all with the original trust deed transactions between Wagner and Unger on Lake Elsinore property. It is a complete, separate transaction. Each purchased differently, Wagner with trust deeds, and Unger with notes and an assumption agreement. Lischner dealt with each party separately.

If there was any conspiracy at an earlier time concerning Lake Elsinore trust deeds, there is no evidence whatsoever that such had any bearing on the Lischner transactions, and this evidence should not have been admitted for it proves nothing in regard to any earlier conspiracy. Even when admitted there should have been a limiting instruction given by the court.

In summary, the evidence is insufficient to support the conviction of Unger. No reasonable inference can be drawn from the evidence that an agreement of any kind was reached with Unger with respect to the disposition of the seven named securities. Therefore, the conviction of Unger should be reversed.

F. IT IS A DENIAL OF DUE PROCESS OF LAW UNDER THE 6TH AMENDMENT OF THE U.S. CONSTITUTION TO FIND THE DEFENDANT GUILTY WHEN HE WAS NOT REPRESENTED BY REASONABLY EFFECTIVE COURT APPOINTED COUNSEL.

Under the 6th Amendment to the U.S. Constitution, the defendant is entitled to have the assistance of counsel for his defense and also to have compulsory process for obtaining witnesses in his favor. To one accused of crime these are very substantial rights.

In MacKenna v Ellis, C.A. Tex. 280 F2d 592, the court stated: "We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective service."

And further in the same case: "(A) trial court who appoints fledgling attorneys cannot wash its hands of their mistakes; an essential element of fair trial is trial court's sensitivity to protecting accused against hasty trials and against obvious mistakes of young, inexperienced, appointed counsel."

In the case of Entsminger v Iowa, 386 U.S. 748, 87 S. Ct. 1402, 18 L Ed 2d 501, the court held that an Iowa indigent who desired that his assigned attorney perfect a plenary appeal was deprived of the right to effective assistance of counsel by the attorney's decision to use Iowa's truncated clerk's transcript.

In Anders v California, 87 S. Ct. 1396, 386 U.S. 738, 18 L. Ed 2d 493, the court held the defendant was denied right to counsel where his appeal was dismissed after appointed counsel had informed

the court that appellant's appeal was without merit.

In the case of Peyton v Coles, 389 F2d 224, (C. A. 4th 1968), the assigned counsel at a rape trial failed to investigate reputation of prosecutrix for chastity, to interview potentially favorable witnesses, to explain to and to interrogate defendant about penetration entitled him to grant of federal habeas corpus in absence of affirmative proof by state that defendant was not prejudiced by his counsel's omissions and failures. The burden of proof of proving effectiveness of counsel was thus shifted to the government.

Keeping in mind that this was a fourteen day trial and the Reporter's Transcript consists of 2,777 pages, involving 108 witnesses, the following is every action that the representing attorney took.

On February 28, 1967, by order of the court, Thomas P. Price was appointed counsel for Peter C. Unger. On March 24, 1967, the attorney filed a Motion for Severance of Defendant, and a Motion to Sever Counts in Indictment. Both motions were denied.

On March 27, 1967, the attorney filed a Motion for Transfer of Case to the District Court of California, Southern District, which was denied.

On June 24, 1967, the attorney stated to the Court that he could not stipulate to the authenticity of certain exhibits pertaining to defendant Peter C. Unger and their admissibility before the time of trial. On June 26, 1967 the attorney filed a Stipulation relating to Exhibits. This is the complete extent of pretrial activity by the attorney. Not filed was a trial brief nor a request for service upon

witnesses nor suggested questions in voir doiring the jury nor any request for travel funds or expenses to interview witnesses.

The trial started July 18, 1967, with the first testimony on July 19, 1967. On that date the attorney joined in motion for mistrial because of publicity of newspaper articles (R.T., p. 17). On that day six witnesses testified, all involving or implicating the defendant. The attorney made no objections of any kind, did no cross-examination, nor did he speak, except to say, "No questions."

On the third day of trial, July 20, 1967, ten witnesses testified, eight of which involved or implicated the defendant. The attorney did a short voir dire of witness, Raymond Paonessa and made one objection which was sustained (R.T., p. 315).

The attorney objected to the relevancy to a question asked witness Donald F. Zimmer, and was overruled. (R.T. , p. 364). The attorney further objected to the asking of a leading question of this same witness, and was sustained (R.T., p. 380). No other objections, no cross-examination by this attorney.

On the fourth day of trial, July 21, 1967, thirteen witnesses testified, six involving or implicating the defendant. The attorney did a very brief cross-examination of one witness, Fred B. Harris (R.T., p. 636). No other cross-examination or objections made.

On the fifth day of trial, July 24, 1967, seventeen witnesses testified, sixteen giving testimony involving or implicating the defendant. The attorney was near mute the entire day.

On the sixth day of trial, July 25, 1967, seven witnesses

testified, five giving testimony involving or implicating the defendant. The attorney was near mute the entire day.

On the seventh day of trial, July 26, 1967, seventeen witnesses testified, four giving testimony involving or implicating the defendant. The attorney was near mute the entire day.

On the eighth day of trial, July 27, 1967, twelve witnesses testified, four giving testimony involving or implicating the defendant. The attorney asked for a limiting instruction as to testimony not involving the defendant which was given by the court (R.T., p.1577).

The attorney made one objection to the testimony of James McClosky, which was sustained (R.T., p. 1598). No other objections nor cross-examination.

On the ninth day of trial, July 28, 1967, twelve witnesses testified, three giving testimony involving or implicating the defendant. The attorney was near mute the entire day.

On the tenth day of trial, July 31, 1967, twenty-one witnesses testified, three giving testimony involving or implicating the defendant. The attorney was near mute the entire day.

On the eleventh day of trial, August 1, 1967, one witness and the defendant testified.

The attorney moved for a directed verdict of acquittal on the ground and for the reason that there is a failure of proof, which motion is denied (R.T., p. 2269). The attorney gave argument supporting his motion (R.T., p. 2269 to 2272).

The attorney moved to strike Overt Act No. 20, and the court reserved judgment on said motion (R.T., p. 2277).

At the conclusion of the direct examination of defendant Unger, the attorney elicited as follows: (R.T., p. 2362-2363)

PRICE: Now, as you know, Mr. Unger, you are charged in one count in what originally was a seventeen count indictment. There are several counts that have been -- at least three counts that have been dismissed as of now. Excuse me, it is a sixteen count Indictment. But, as you know, you are charged in just the one count on conspiracy; is that right?

UNGER: That's right.

PRICE: Now, I am going to ask you, Mr. Unger, you have sat here now and you have heard all of these transactions from these various people. I think there were 109 witnesses that testified in this case prior to the defense putting on their testimony.

UNGER: Yes, sir.

PRICE: And you are charged in this conspiracy with, among other things, of course, conspiring to defraud the United States of America and/or an agency thereof.

MR. SEPENUK (Prosecuting attorney): To correct the record, he has not been charged with that at all. He is not named in that---

PRICE: Oh, am I confusing that with 14, Mr. ---

SEPENUK: That is 14 that you just mentioned. He is not charged with that. He is charged in Count 1, which is not the count

charging fraud against the government. He is charged with mail fraud and the securities fraud.

PRICE: Thank you, Mr. Sepenuk, you are absolutely right.

Further on this day, the attorney again requests a ruling on the motion to strike Overt Act No. 20 (R.T., p 2383).

The attorney speaks once more, to advise the court that his argument will be brief (R.T., p. 2391).

On the twelfth day of trial, August 2, 1967, one witness testified, whose testimony involved and implicated the defendant, and the defendant completed his testimony. The attorney made one objection, during the cross-examination of the defendant, as to the introduction of a letter, without the witness first reading it, which was sustained, (R.T., p. 2448).

On the thirteenth day of trial, August 3, 1967, the attorney spoke on five occasions. He got stricken words from Overt Act No. 20 that Unger "represented himself as an officer of Golden Rule Development" (R.T., p 2657).

The attorney made a motion for a Directed Verdict of Acquittal, which was denied (R.T., p. 2664).

The attorney objected to any merger of the two counts of conspiracy (R.T., p. 2670).

The attorney requested a ruling on his objection as to any merger, which was sustained (R.T., p. 2675).

The attorney asked the court as to the propriety in discussio of non-controversal elements of the crime of conspiracy in argument

to the jury (R.T., p. 2679).

On the fourteenth day of trial, the attorney stated that he had no comments as to the proposed jury instructions by the court (R.T., p. 2716). The attorney did not submit any requested jury instructions.

The attorney discussed the court's instructions as being prejudicial to the defendant; but then stated that he was not critical of the court as that was the only way that the court could instruct (R.T., p. 2771).

Thus, in a fourteen day trial, involving the testimony of 109 witnesses, of which 49 gave testimony involving or implicating the defendant, the attorney spoke on but twenty-one occasions, and made but three objections and cross-examined but once and then only briefly. It is difficult to envision a contested criminal action in which there would exist no necessity for cross-examining at least some of the prosecution's witnesses.

In Cofield v United States, 263 F.2d 686, 688 (9th Cir.), the court quoted the following from Edwards v United States, 78 U.S. App. D.C. 226, 139 F.2d 365: "The right to the assistance of counsel means effective assistance."

The attorney, after ten days of trial, is so incompetent and confused that on direct examination of his own client, asks him if he isn't indicted on another count entirely separate from that which the attorney is representing the defendant, and the prosecutor has to straighten the attorney out. This conduct was embarrasing and highly

prejudicial to the defendant.

At the conclusion of the government's case, Unger's attorney moved for a directed verdict and argued as follows (R.T., p. 2664):

"But the thing is that Mr. Unger, being involved in only Count I, I can't see, your honor, where they have shown anything, except through inference and that is that it amounts to, and there are several inferences. There are probably many of them, but all these transactions infer that Mr. Unger was part of this conspiracy to defraud the United States of America or its agencies and, in this particular case, the Federal Housing Administration. And I say that the proof is completely devoid of any evidence that Mr. Unger was in this conspiracy to accomplish the ends that the government has attempt to prove..."

It is clear from the argument at the conclusion of the case that Unger's attorney thinks he is charged with a conspiracy to defraud the United States of America. Thus revealing that he believes the most important part of the case against Unger is the inferences that he agree to defraud agencies of the United States, particularly the Federal Housing Authority. He makes no references to any other victims or specific transactions. He has totally missed the point of the prosecution's case and mistakenly is defending against Count XIV in which Unger is not charged. The attorney's trial strategy is thus revealed to be totally irrelevant to the specific charge against Unger.

The failure to object often to the evidence introduced is indicative only of the amount of action that the attorney took, not as to the possible propriety of his remaining silent.

The attorney's near complete failure to cross-examine is again indicative of the lack of action taken by the attorney.

The failure to file a motion for the issuance of subpoenas and the failure to call any defense witnesses is incredible in view of Unger's decision to take the stand and fight. The failure to move for misjoinder under Rule 8 (b) was highly damaging to Unger.

The overall effect is akin to no representation whatsoever, for the accused's defense would have been as well presented had he had no attorney at all. The representation afforded was thus not effective assistance of counsel and Unger was denied due process of law.

The refusal of the court to allow expenses for interviewing witnesses as well as the subpoena expenses, also prevented Unger from obtaining due process of law.

G. THERE WAS A MATERIAL VARIANCE BETWEEN THE PLEADING AND PROOF REQUIRING A REVERSAL AS TO DEFENDAN PETER C. UNGER IN THAT MULTIPLE CONSPIRACIES WERE ATTEMPTED TO BE PROVEN UNDER COUNT I.

The proof demonstrates that each overt act alleged under Count I was in fact, a separate conspiracy, if there was in fact, any conspiracy at all. The alleged agreement had as its object, the violation of the anti-fraud section of the securities act directly and by the use of mails. The indictment is vague as to when this agreement was entered into. The period of time covered is apparently commencing prior to 1963, when Unger executed trust deeds and ending on the date of the indictment on December 7, 1966, a period in excess of three years. Of the 64 overt acts listed in Count I, in only 6 is Unger' name mentioned. Every purchase or proposed purchase of property from alleged victims, if there was a conspiracy, was a separate conspiracy. There were at least 23 purchases or alleged purchases of properties listed as overt acts in Count I. The properties ranged from houses to multi-million dollar hotels and apartments and spanned a period of in excess of 3 years. Each transaction was a complex individually negotiated transaction with each property owner having his own individual requirements. None of these properties could have been anticipated in advance to be available for purchase until they were listed for sale by the owners.

Analyzed from the point of view of notes, both secured and unsecured that were created for the purpose of exchanging property,

there would be seven different conspiracies. There were seven different individuals and corporations who signed the notes, all at different times and places. If there were an initial agreement, every time a new party came into the venture, and new notes were used, implicitly a new agreement would have been required to establish the relationship of the parties among themselves.

The one defendant common to the other defendants was J. Wagner, If J. Wagner had an agreement with Unger to use the notes executed by Unger to defraud others and share the profit s in some manner with Unger, J. Wagner's later agreement with each of the othe defendants would be a separate conspiracy. He joined with Christensen and Jongeward at apparently the same time, but each of the other defendants is alleged to have joined at a later time. The relationship of each defendant with J. Wagner was different, even if it be concluded that each conspired with J. Wagner to defraud property owners.

Even if it be concluded that Unger conspired with the defendants on several transactions, where his trust deeds were traded and where he had some connection with the transaction, he would not have conspired in connection with the other transactions, particularly the transactions where GRR issued unsecured notes and fortified same by showing high net worth financial statements. That being the case, the variance would be highly prejudicial to Unger.

In the leading case of Kotteakas v United States, 328 U.S. 750, the petitioner and 31 others were indicted for a single general conspiracy to violate the National Housing Act by inducing lending institutions to make loans which would be offered to the Federal

Housing Administration for insurance on the basis of false and fraudulent information. Nineteen defendants were brought to trial and the cases of 13 were submitted to the jury and 7 were convicted. The' evidence proved eight or more different conspiracies by separate groups of defendants which had no connection with each other except that all utilized one, Brown, as a broker to handle fraudulent applications, who knew, when he obtained the loans that the proceeds w not to be used for the purposes stated in the applications.

The court held the rights of the petitioner were substantiall prejudiced, stating that "if one cannot say with fair assurance after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected."

At page 773 "when many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in relation to the mass."

The court stated in the Kotteakas case on page 766 describi the burden applicable to the instant case as follows:

"Obviously the burden of defense to a defendant, connected with one or a few of so many distinct transactions, is vastly different not only in preparation for trial, but also in looking out for and securing safeguard against evidence affecting other defendants, to prevent its transference as "harmless error," or by psychological effect, in spite of instructions for keeping separate transactions separate."

The instant case created an infinitely greater burden on Unger than the Kotteakas case because of its multitude of complicated business transactions as well as its geographically widespread operations. Such a burden was truly overwhelming particularly when the indigent status of Unger is taken into account as well as the ineffectiveness of counsel.

H. THE TRIAL COURT ERRED IN NOT SEVERING THE TRIAL OF PETER C. UNGER FROM THE OTHER DEFENDANTS BASED ON PREJUDICIAL JOINDER UNDER RULE 14 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

If the court determines there is no misjoinder under Rule 8 (b) of the Federal Rules of Crimi nal Procedure, then the trial of Unger should have been severed from the other defendants because of the extreme prejudicial effect of a joint trial, under Rule 14. The reasons cited in the argument concerning multiple conspiracies are applicable here and the following are reasons why the joinder prejudicied Unger:

1) Multiple conspiracies were involved in Count I, rather than a single conspiracy.

2) The fact that only 1 of 17 Counts or 6% of the charges pertained to Unger meant that the overwhelming evidence presented did not pertain to Unger and thus greatly confused the jury.

3) Unreasonable expense was imposed on Unger in subjecting him to lengthy trial, the great majority of which did not pertain to him.

4) It was an undue and unreasonable hardship on Unger to subject him to a trial in Portland, Oregon, a place over 2000 miles from his home that he had never set foot in, where the only actual overt acts Unger did, in connection with the purported securities fraud was to execute trust deeds in California some 1 to 3 years prior to the time they were allegedly transferred in violation of the Securitie Law.

5) The vast publicity surrounding the trial and the other defendanta prevented Unger from getting a fair trial.

6) Unger was prevented from calling the co-defendant John Wagner as a witness since he chose not to take the stand.

In the United States v Echeles, (CA 7th 1965) 352 F2d 892, the court held that where it was clear from the record that the codefendant would testify in exculpation if a severance were granted, denial of a severance would be an abuse of process.

In United States v Decker, (CA 4th) 140 F2d 375, the court held where evidence established severance should have been granted to insure a fair trial, a new trial will be granted.

The rationale in the Kotteakos case (supra) is also applicable to prejudicial joinder. The court stated the defendants had a right "not to be tried en masse for a conglomeration of distinct and separate offenses committed by others as shown by this record."

The confusion of the jury with respect to separating the evidence is shown by the court's statement (Tr. 2674): "It would be quite easy for the jury and even legitimate under the instructions, I think, that have been submitted to find them guilty on both Count I and 14 for the same identical acts, and obviously that would not be fair..."

Therefore the conviction of Unger should be reversed based on prejudicial joinder.

I. THE TRIAL COURT ERRED IN ADMITTING ADMISSIONS OF PETER C. UNGER TO AN INVESTIGATION OFFICER, WHERE HE HAD NOT BEEN ADEQUATELY ADVISED OF HIS CONSTITUTIONAL RIGHTS.

James E. McCloskey, an agent for the Federal Bureau of Investigation was permitted to testify at length to admissions made by Peter C. Unger during interviews made on November 17, 1965 and on one additional occasion (R.t. p 1584-1601.) He testified that Mr. Unger was advised of his constitutional rights, (R.T. p 1584), but he did not testify that Mr. Unger was entitled to an attorney and if he couldn't afford an attorney, the court would appoint one, nor that he had a right to remain silent and that anything he said could be used against him. He further testified that Unger responded that he felt he had done no wrong and did not feel he needed an attorney, thus inferring that at least the need for an attorney was discussed. However, since there was no inference of Mr. Unger being advised of his right to remain silent and that anything he said could be used against him, the admonitions were insufficient. The testimony of Unger's admissions were highly prejudicial and were made after the accusatory stage had been clearly reached. The fact that no objection was made to the testimony due to the incompetency of Unger's counsel should not be deemed a waiver of the objection.

James R. Neves, also an agent of the Federal Bureau of Investigation, testified to admissions made by Unger on August 29, 1966 (R.T. pg 1602-1608) He testified that he also advised Unger of his

constitutional rights but did not specify what the specific advice was nor did he testify as to any response Unger made. This testimony of admissions was similarly highly prejudicial and was received subsequent to the accusatory stage being reached and should have been excluded.

The case of Miranda v State of Arizona, (1966) 384 U.S. 436, required that where a person was in custody, prior to interrogation, he must be clearly informed that he has the right to remain silent and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him. The court further stated that where an interrogation is conducted without th presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his right to counsel. The case of Carnley v Cochran, 369 U.S. 506, 516 (1962), was cited with approval as follows: "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show that an accused was offered counsel, but intelligently and understandingly rejected the offer. Anything less is not waiver."

Testimony that Unger was advised of his constitutional rights was a conclusion and insufficient evidence of waiver. The fact that his counsel did not voir doir the witness is also not a waiver, because of counsel's ineffectiveness. The fact that Unger was not in actual physical custody goes beyond the Miranda case. In Mathis v

United States, 36 L.W. , 4379, the court held that the failure of an Internal Revenue agent to give the Miranda warnings prior to routine questioning was grounds for reversal. In this case the man was a Florida prisoner, but his custody had nothing to do with the interrogation. The U.S. Supreme Court has docketed the case of Kubik v United States, docket No. 309, appealing from the 8th Circuit decision dated May 20, 1968. This case squarely raises the question of whether or not the Miranda warnings are applicable to all governme interrogations made in the course of official investigations that seek to elicit information that can be used in criminal prosecution. Assuming the court holds that the warnings are applicable, the decision will be right on point with the instant case. It is submitted that the court will decide that the warnings are applicable, and that hence Unger should have been so warned, and the failure to do so was reversible error.

Miranda v State of Arizona, (1966) 384 U.S. 436, 86 S. Ct. 1602, 162 Ed 2d, 694.

After the accusatory stage was reached, the defendant should be advised of his constitutional rights.

Chapman v State of California, (1967) 386 U.S. 10

Mathis v United States, 36 LW. 4379, Failure of IRS agent to give the Miranda warnings before questioning a Florida prisoner was grounds for reversal.

Docket No. 309 Kubik v United States, C.A. 8 (5-20-68) Court held that Alcohol and tobacco Tax Unit Investigator's failure to give Miranda warnings to night club owner during pre-custody interrogation at night club, did not bar use against him of statements made to

agent. A question presented to the Supreme Court is: Must warnings required by Miranda v Arizona, 384 U.S. 436, be given only to suspects who have been arrested or physically taken into custody, or are they applicable to all government interrogations made in course of official investigations that seek to elicit information that can be used in criminal prosecution?

Miranda v Arizona, 384 U.S. 436. The prosecution may not use statements, whether exculpatory or inculpatory, stemming fro questioning initiated by law enforcement officers after a person has bee taken into custody or otherwise deprived of his freedom of action in any significant way, unless it demonstrates the use of procedural safe- guards effective to secure the fifth amendement privilege against self- incrimination.

In the absence of other effective measures the following procedures to safeguard the Fifth Amendment privilege must be observed: The person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation and that, if he is indigent, a lawyer will be appointed to represent him.

Where an interrogation is conducted without the presence o an attorney and a statement is taken, a heavy burden rests on the gover ment to demonstrate that the defendant knowingly and intelligently waived his right to counsel.

A statement was made in Carnley v Cochran, 369 U.S. 506, 516, (1962) which is applicable here:

"Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which shows that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

J. THE TOTALITY OF THE ERRORS, INCLUDING PUBLICITY, CHANGE OF VENUE, MISJOINDER, INADEQUACY OF COUNSEL, VARIANCE, IF INSUFFICIENT STANDING ALONE, WHEN CONSIDERED AS A WHOLE DENIED PETER C. UNGER DUE PROCESS OF LAW AND THE CONVICTION SHOULD BE REVERSED.

Trial of this action took place in Portland, Oregon, a city that Unger had never been in, and over 1,500 miles from his home in San Diego, California. A great deal of publicity was generated in the foreclosure of the Hollywood Towne House, a Federal Housing Administration sponsored multiple story apartment project. This publicity went on for about a year prior to the trial. The trial was also widely publicized. The court did not poll the jurors individually as to whether or not they had read the publicity concerning the trial. The fact that a great deal of publicity was in evidence prior to the trial and would continue through the trial, strongly supported the appeal to change the trial venue, which the court failed to do.

The joinder of Unger with the other defendants, who were charged with 16 other counts, inevitably led to a great deal of confusion and prejudice in the minds of the jurors.

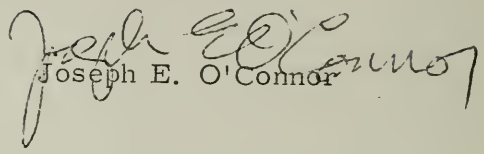
The defendant's court appointed attorney was almost totally ineffective. The variance between the pleading and proof was highly material. The admissions made by Unger, were made without adequate representation.

The overall effect of the entire proceedings when weighed as a whole is that Unger was denied due process of law in the conduct of the trial.

VI CONCLUSION

The conviction of Peter C. Unger should be reversed under each of the arguments presented. Alternatively a new trial should be ordered.

Respectfully submitted,



Joseph E. O'Connor

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with those rules.

JOSEPH E. O'CONNOR
Attorney for Appellant-
Defendant
PETER C. UNGER